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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 514

BYRON THORNHILL,

Petitioner

v.

STATE OF ALABAMA

Respondent

BRIEF FOR RESPONDENT

THOS. S. LAWSON,
Attorney General of Alabama

WILLIAM H. LOEB,
Assistant Attorney General of Alabama.

For the State of Alabama.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 514

BYRON THORNHILL,

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v.

STATE OF ALABAMA

Respondent

BRIEF FOR RESPONDENT

OPINION OF THE COURT BELOW

I.

The case is before this Court pursuant to certiorari granted December 11, 1939. The opinion of the Court of Appeals of Alabama, which petitioner asks this Court to review, is reported in 189 So. 913, certiorari denied, without opinion, by the Supreme Court of Alabama, 189 So. 914. All of the judges of the Court of Appeals concurred in the opinion of the Court of Appeals and all of the justices of the Supreme Court concurred in the opinion denying certiorari.

II.

JURISDICTION

1. The statutory provision by which jurisdiction of this proceeding is authorized is Section 344 of Title 28 U. S. C. A. (Judicial Code, Section 237, as amended by an Act of February 13, 1935, 43 Stats. 939).

2. The opinion of the Court of Appeals was rendered on January 17, 1939. On June 15, 1939, the Supreme Court entered its order denying petition for certiorari.

3. Petitioner is here insisting that Alabama's so-called anti-picketing law, Section 3448 of the Code of Alabama, 1923, is violative of the Fourteenth Amendment to the Constitution of the United States, in that, it deprives the petitioner of freedom of speech and assemblage.

III.

STATEMENT OF THE CASE

Petitioner was one of several persons on a picket line at the Brown Wood Preserving Company, Inc. at Brownville in Tuscaloosa County, Alabama, occupying such position on the picket line pursuant to a strike order of November 24, 1937 (R. 9). The evidence reveals that prior to the strike approximately one hundred men were employed at the plant, all but four of them being Union members (R. 12).

It appears that approximately two or three weeks (R. 9, 11) after the issuance of the strike order, a notice was posted on the premises of the Brown Wood Preserving Company by the company notifying its employees that the plant would resume operations (R. 9). The chief witness for the State, Clarence Simpson, an employee of the Brown Wood Preserving Company and a non-Union man, testified, without contradiction, that, having read the notice, he attempted to report to work on the date indicated therein; and when he reached the plant he saw a member of the Union, Byron Thornhill, this petitioner, on the picket line at the plant, and that Byron Thornhill, *in company with six or eight other men*, "came out and told me they were on a strike and did not want anybody to go up there to work" (R. 10). It appears from Simpson's testimony that a picket line had been continuously maintained around the plant for the two or three weeks since the time the strike had been called "with two picket posts on said line and about six or eight men on each picket post," and that "three shifts of men stay on the post in each twenty-four hours" (R. 9). According to Union member, J. M. Walden, also a witness for the State, the picket "made assurance that there would be no work going on there" (at the Brown Wood Preserving Company plant) (R. 12).

There was also evidence introduced tending to show that the company attempted to resume operations—on the date stated in the notice—by building a fire in one of their cranes but that "some of the pickets took the fire out of the crane" (R. 11).

No evidence was introduced by the defendant.

The petitioner was arrested for his activities in connection with the picket line, and prosecuted for violation of Section 3448 of the Code of Alabama, 1923, which provides as follows:

> "Section 3448. Loitering or picketing forbidden.—Any person or persons who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The case was tried in the Inferior Court of Tuscaloosa County (R. 1, 2, 3) and from the judgment of conviction in that court (R. 5) petitioner appealed to the Circuit Court of the county. The solicitor of said Circuit Court duly filed his complaint against petitioner (R. 5), and the defendant, failing to demand trial by jury, was placed on trial

on December 20, 1937, before the Circuit Court of Tuscaloosa County, sitting without a jury. (R. 9) The Court found the defendant guilty of the offense of loitering and picketing denounced by Section 3448, supra, and assessed a fine of $100 as punishment for the commission of said offense. (R. 8) Thereupon, petitioner appealed to the Court of Appeals of Alabama, (R. 14) which court, on January 17, 1939, affirmed the decision of the Circuit Court of Tuscaloosa County (189 So. 913). (R. 16) Rehearing was denied by the Court of Appeals on May 23, 1939, without further opinion (R. 18), whereupon petitioner applied to the Supreme Court of Alabama for writ of certiorari to the Court of Appeals to review and revise the judgment and decision of that court, (R. 20) which writ was denied without opinion by the Supreme Court of Alabama on June 15, 1939 (189 So. 914). (R. 22) Petition for certiorari was filed in this court on November 9, 1939, and granted December 11, 1939.

We have set forth the evidence with great particularity herein for the reason that petitioner, on page 11 of his brief in support of petition for writ of certiorari makes the statement that his action on the occasion in question consisted of asking another employee "without threats, or show of force, direct or implied, not to resume his employment in an industrial plant until a strike then in progress was settled." We do not feel that this statement is justified by the evidence and for that reason we have attempted to set out the facts as we have found them to appear of record.

It is also to be noted that in petitioner's "statement of the case" on page 11 of brief, he asserts that the Court of Appeals "interpreted the statute in the case at bar, as preventing any picketing whatsoever, regardless of whether or not it was peaceful and further construed the statute as preventing one worker asking another worker not to accept employment in an employer's plant." We respectfully direct the court's attention to the opinion of the Court of Appeals of Alabama, which is set forth on pages 16 and 17 of the record. Nowhere therein do we find any indication that the Court of Appeals interpreted the statute as preventing all picketing whatsoever, whether or not it was peaceful, or as preventing one worker asking another worker not to accept employment in an employer's plant. All that was held was that the evidence introduced upon the trial of Thornhill was sufficient to bring his actions within the prohibition of the statute which the Court stated had previously been held constitutional in the cases which were thereafter cited in the opinion.

IV.

ARGUMENT.

A

IT DOES NOT AFFIRMATIVELY APPEAR FROM THE RECORD THAT A FEDERAL QUESTION WAS NECESSARILY DECIDED IN DETERMINING THE CAUSE.

On appeal from the Circuit Court of Tuscaloosa County to the Court of Appeals of Alabama, the review sought by this petitioner involved questions of rights under the Constitution and laws of the State of Alabama and under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals affirmed the judgment of the Circuit Court of Tuscaloosa County (189 So. 913), stating in its opinion that its decision was based entirely upon the former decisions of the Supreme Court of Alabama, as was required by statute (Code of Alabama, 1923, Section 7318). The Supreme Court cases cited as authority for its conclusion that Section 3448 of the Code of Alabama, 1923, (the forerunner of which was Section 6395 of the Code of 1907) was constitutional were *Hardie-Tynes Mfg. Co. v. Cruise et al*, 189 Ala. 66, 66 So. 657, and *O'Rouke v. City of Birmingham*, 27 Ala. App. 133, 168 So. 206, certiorari denied without opinion, 232 Ala. 355, 168 So. 209. The Hardie-Tynes case was the earlier of the two decisions, being decided November 17, 1914. In that case it is to be noted that

the Court made no reference to the Constitution of the United States in passing on the question presented to it for decision. The court merely stated:

> "It is suggested by counsel for respondents that our construction of section 6395, as being an inhibition of picketing even where threats or violence are not used, renders it unconstitutional. *No intimation is offered as to what provision of the Constitution is thereby offended, and we can think of none.* Certain it is that a right to actively and directly interfere with and prevent the operation of a lawful business of another is not included among the inalienable rights of 'life, liberty, and the pursuit of happiness.' The 'liberty' guaranteed by the Constitution (article 1, section 1) is liberty regulated by law and the social compact, and in order that all men may enjoy liberty it is but the tritest truism to say that every man must renounce unbridled license. So, wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulations of municipal law. If one man asserts the constitutional rights of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of that other person to pursue his business unmolested? It is clear that this notion of liberty utterly ignores 'the other fellow,' and denies to him the very freedom it claims for itself." (Emphasis supplied)

Obviously, the Supreme Court was considering only the Constitution of Alabama.

In the O'Rouke case, decided on February 18, 1936, the Court of Appeals on the original hearing stated:

> "So far as we are able to ascertain the statutes in question are valid enactments and the provisions of the statutes in question in no manner offend *the Constitution of this state.* This is our conclusion after a careful and attentive consideration of the questions, in all of their phases, has been accorded." (Emphasis supplied)

It appears that the Court disposed of all the questions presented to it by basing its conclusions upon consideration of only the Constitution of Alabama. However, on rehearing in the O'Rouke case it was insisted by counsel that the opinion be extended, and the Court, after stating that it had no inclination to deprive the appellant of any right or to restrict in any manner his right of review, held that the ruling of the trial court had no tendency to deprive the appellant of any rights guaranteed him by the provisions of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court denied certiorari without opinion, and there is no showing that any Federal question was considered by the court—the highest court of the State of Alabama.

It therefore appears that the Court of Appeals of Alabama in its opinion in this case has not affirm-

atively stated that its decision rested upon the application of the Constitution of the United States. The Supreme Court of Alabama denied certiorari, thus affirming the judgment of the Court of Appeals, but without opinion (189 So. 914). The grounds of the decision of the Supreme Court are left to conjecture. Even assuming that it may be surmised, from the decisions quoted in its opinion, that the Court of Appeals intended to rest its decision upon a consideration of the Fourteenth Amendment, and that the denial of certiorari by the Supreme Court was upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State of Alabama, we call the Court's attention to the line of cases holding that jurisdiction cannot be founded upon surmise.

Eustis v. Bolles, 150 U. S. 361, 366, 367;

Lynch v. New York, 293 U. S. 52, 54;

Whitney v. California, 274 U. S. 357, 360, 361.

In *Lynch v. New York, supra*, it was stated:

> "It is essential to the jurisdiction of this Court, in reviewing a decision of a state that it must appear affirmatively from the record not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the case, and that it was actually decided or that the judgment rendered could not have been given without deciding it."

The Court also states in the Lynch case that:

"Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

See also McGoldrick v. Gulf Oil Co., 84 L. Ed. 336 (Adv. Sheet).

In the present case, the record shows that in the demurrer to the affidavit in the Inferior Court of Tuscaloosa County (R. 3, 4—Demurrer No. 4), in the demurrer to the complaint in the Circuit Court of Tuscaloosa County (R. 6, 7—Demurrer No. 4), in the motion to exclude the evidence in the Circuit Court (R. 13), and statement of counsel (R. 14) that he wanted to raise constitutionality of the statute and claimed it to be violative of the Constitution of the State of Alabama and of the United States, and in the petition for certiorari to the Court of Appeals (R. 20, 21—Grounds No. 1, 3 and 6) counsel raised the constitutionality of the statute under both the Constitution of Alabama and the Constitution of the United States. Neither the decision of the Court of Appeals nor the decision of the Supreme Court of Alabama on certiorari specifically treats the questions involving the Fourteenth Amendment to the Constitution of the United States. It is submitted that since it does not affirmatively appear upon which of the two grounds the

judgment of these courts was based, this Court should not have taken jurisdiction of the cause.

It may be insisted, however, that judgment in this cause could not have been rendered without deciding the federal question. Both the Court of Appeals and the Supreme Court judicially knew that this Court had settled the constitutionality of statutory provisions calculated to prohibit *unlawful* picketing.

American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184;

Truax v. Corrigan, 257 U. S. 312;

O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U. S. 251, 267;

Senn v. Tile Layers Union, 301 U. S. 468, 479.

It is reasonable to presume, therefore, that these appellate courts of the State of Alabama, in considering this question, determined from the facts, as will be hereinafter shown, that what was involved was not an act of "peaceful picketing" but rather that there existed a picket line originated for an unlawful purpose and calculated to bring about fear and intimidation, together with the ensuing disturbances and breaches of the peace which so often follow such activities.

Applying the rule, therefore, that this Court will not resort to conjecture to determine whether

the court of last resort of a State has passed on a federal question, it is submitted that the lack of jurisdiction is here clearly shown.

B

SECTION 3448 OF THE CODE OF ALABAMA, 1923, IN ITS APPLICATION TO THIS PETITIONER HAS NOT DEPRIVED HIM OF ANY RIGHT GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

There is yet a further reason why this Court should not reverse the judgment of the Supreme Court of Alabama and why it should now conclude that this statute does not deny this petitioner any rights guaranteed him by the Federal Constitution.

One attacking the constitutionality of a statute is the champion of no rights but his own.

Henneford v. Silas Mason Co., 300 U. S. 577, 583.

This rule, when applied to this petitioner, can only result in this Court dismissing the petition as having been improvidently granted or affirming this cause.

It has been shown that petitioner was a member of a picket line which was maintained on the property of the plant picketed throughout the twenty-four

hour period of every day for the more than two weeks during which the strike existed, and that at least twelve men were on the picket line at all times. Petitioner here insists that Section 3448 of the Code of Alabama, 1923, prevents "peaceful picketing" and, therefore, amounts to an exercise of arbitrary power in violation of the due process of law provision contained in the Fourteenth Amendment.

It is respectfully submitted (assuming for the moment that Section 3448 does make unlawful "peaceful picketing," and that a statutory enactment prohibiting "peaceful picketing" is violative of the Fourteenth Amendment to the Constitution) that this petitioner is in no position to raise this constitutional question in this court for the reason that he was not "peacefully picketing" but, on the contrary, that it clearly appears from the undisputed evidence that the picket line of which he was a part was in such proximity to the plant, and of such numbers, as to indicate that its prime purpose was to intimidate rather than to peacefully persuade prospective employees of the company.

The courts, both federal and state, have established quite definite rules for determining the boundaries governing the extent to which picketing may be carried before it becomes "intimidating." This court in *American Steel Foundries v. Tri-City Central Trades Council, et al.*, 257 U. S. 184, 204, in considering the decree of injunction in a labor controversy entered in the District Court for the Southern District of Illinois before the date of the Clayton Act (Oct. 15, 1914, C. 323, 38 Stat. 738) but which was

pending on appeal in the Circuit Court of Appeals when the act was approved, after holding that Section 20 of the Clayton Act was enacted to forbid an injunction against peaceful picketing, concluded:

> "In the present case the three or four groups of picketers, were made up of from four to twelve in a group. They constituted the picket lines. * * * *The numbers of the pickets in the groups constituted intidimation.* The name 'picket' indicated a militant purpose, inconsistent with peaceful persuasion. * * * The nearer this importunate intercepting of employees or would be employees to the place of business, the greater the obstruction and interference with the business and especially with the property rights of access of the employer." (Emphasis supplied)

After reaching these conclusions, and stating that "each case must turn on its own circumstances", this court proceeded to announce the following guide:

> *"The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries."* (Emphasis supplied)

In line with this principle, in the Tri-City case, supra, one "observer" was permitted at each entrance and exit of complainant's plant with the "right of observation, communication and persuasion, avoiding abuse, libel or threats" who in "their efforts singly should not obstruct an unwilling

listener by importunate following or dogging of his steps."

The cases cited by the learned Chief Justice in the Tri-City case, supra, in support of his conclusions are sufficient authority to demonstrate that the petitioner should not be heard to complain that he is denied any essential inherent right by the application of Section 3448 of the Code of Alabama, 1923, to him.

The Tri-City yardstick and that of the cases cited therein ineluctably impels the conclusion that petitioner was a member of a group engaged in the intimidation of those employees who were returning to work as requested by the officials of the Brown Wood Preserving Company. In no sense of the word can petitioner's activities on such line be passed off as peaceful. The State's chief witness asserted that this petitioner approached him "in company with six or eight other men" (R. 10) and told him that "he did not want anybody to go up there (to the Brown Wood Preserving Company plant) to work" (R. 10). There is no indication that Thornhill attempted to explain the purposes of the strike or of the picket to the witness, Simpson, or that he attempted to persuade Simpson, by force of logic, from going back to work. The testimony shows that he indicated to Simpson the fact that he (Thornhill) did not want Simpson to go back to work. This statement was made in the presence of six or eight other men. It is not difficult to perceive that such a statement in the presence of such a body of men must have tended to intimidate the man who desired

to return to his former employment at the Brown Wood Preserving Company. Manifestly the use of such a large number of pickets cannot reasonably be regarded as intended for a lawful purpose. Indeed, the statement of the State's witness, Walden (R .12) that the picketers "made assurances that there would be no work going on" at the plant demonstrates the actual nature and character of the picket. The picket, like the sentry in wartime, had one duty, and that was to prevent the enemy from passing. It was a standing threat of violence to anyone so foolhardy as to resist its commands. The fact that on this particular occasion no acts of violence were resorted to by Thornhill cannot control, for in the final analysis the threat of violence was present and must have had its effect upon those employees who sought to return to work.

Although, as hereinbefore stated, we are firmly convinced that the cases cited by Chief Justice Taft in the Tri-City case are ample support for the State's contention that petitioner was guilty of intimidating acts, for the convenience of this Court we here point out certain other cases which strongly indicate the nature of the intimidation which the courts are inclined to repress. In *Gevas v. Greek Restaurant Workers Club*, 99 N. J. Eq. 770, 783, the court after a very interesting and illuminating discussion of the rule in the *American Steel Foundries v. Tri-City G. T. Council*, supra, and the statement of Chief Justice Taft in *Truax v. Corrigan*, 257 U. S. 312, 340, that "peaceful picketing" is a "contradiction in terms" concludes:

"A single sentinel, constantly parading in front of a place of employment for any extended length of time may be just as effective in striking terror to the souls of the employees, bound there by their duty, as was the swinging pendulum in Poe's famous story 'The Pit and the Pendulum' to the victim chained in its ultimate path. In fact, silence is sometimes more striking and impressive than the loud mouthings of the mob. It is the show of force back of the demonstration, or the inevitableness of the impending disaster, which tries men's souls and drives them to desperation. It is admitted that back of the present demonstration is the full force and power of the American Federation of Labor, of which the pickets and their sentinels are scouts."

In the comparatively recent case of *Bayonne Textile Corp. v. American Federation of Silk Workers*, 114 N. J. Eq. 307, 168 A. 799, the Court of Chancery of New Jersey speaking to the particular question of intimidation by numbers states:

"Manifestly the use of a large number of pickets cannot reasonably be regarded as intended for a lawful purpose. The assembling of a large number of persons on the streets leading to complainant's factory, without extra pickets, undoubtedly has a tendency to terrorize other persons who might desire to work for complainant whose place of business is thus picketed."

In *LaFrance etc. Co. v. International Brotherhood of Electrical Workers*, 108 Ohio St. 61, 140 N. E. 899, the court concludes that:

> "Picketing in such numbers as to prevent free access to the plant of the employer, or in itself to constitute a threat of physical force, is unlawful."

In *Franklin Union No. 4, v. People of Illinois*, 220 Ill. 355, 77 N. E. 176, 185, the court states:

> "Intimidation and coercion are relative terms. What would put in fear a timid girl or weak woman or man might not terrorize the strong and resolute. All are entitled alike to the protection of the law."

The Supreme Court of Connecticut in *Levy & Devaney, Inc. v. International Pocketbook Workers Union et al.*, 114 Conn. 319, 148 Atl. 795, in holding that the conduct of a picket may be such as to constitute intimidation, even though there is no use of force or physical violence, concludes:

> "To intimidate is to inspire with fear, to overawe or make afraid. Fear may be inspired without physical violence or spoken threats, moral intimidation may be accomplished by a menacing attitude and a display of force which may coerce the will as effectively as actual physical violence. The gathering of strikers in considerable numbers at the entrance of a factory with threatening attitude toward em-

ployees who must run the gauntlet of a hostile picket line in going to and from work, may overawe and make them afraid by the show of force which itself is intimidating. The well-considered authorities all hold that the conduct of a strike may be such as to constitute intimidation, though there is no use of force or physical violence. State v. Stockford, 77 Conn. 227, 237, 58 A. 769, 107 Am. St. Rep. 28; Vegelahn v. Gunther, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; Jefferson & Ind. Coal Co. v. Marks, 287 Pa. 171, 134 A. 430, 47 A. L. R. 745; Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324; Keuffel & Esser v. Int. Ass'n of Machinists, 93 N. J. Eq. 429, 116 A. 9; Bomes v. Prov. Local No. 223 (R. I.) 155 A. 581; Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375; 7 Labatt's Master & Servant, Section 2706; 1 Eddy on Combinations, Section 538; Cogley on Strikes & Lockouts, 292; 32 C. J. 166, 182."

See also *Greenfield v. Central Labor Council*, 104 Ore. 236, 192 P. 783, 207 P. 168, holding picketing cannot be peaceful where more than one picket is employed.

Also *Crouch v. Central Labor Council*, 134 Ore. 612, 293 P. 729 (Ore.). And see *Jefferson & I. Coal Co. v. Marks*, 134 A. 430, 287 Penn. 171 and *Bomes v. Prov. Local No.* 223, 51 R. I. 499, 155 A. 581, holding that a continuation of a picket line for an extended period of time created a situation calculated to engender annoyance, fear and intimidation.

In the Marks case, supra, the court stated:

> "Persuasion, too long and persistently continued, becomes a nuisance and an unlawful form of coercion."

There are also numerous decisions of the federal courts on the question. A number of them are gathered in *Ex Parte Richards*, 117 F. 658, 666. Most of these federal cases adopt the view stated in *In re: Dooling*, 23 F. 545, that:

> "A simple 'request' to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to burden and obstruct employees in the performance of their duties is not less obnoxious than the use of physical force for the same purpose. A 'request' under such circumstances is a direct threat and not intimidation, and will be punished as such."

Cf. *Vonnegan Machinery Co. v. Toledo Machinery & Tool Co.*, 263 F. 192, 199, wherein the court asserts that "practical people question the possibility of peaceful persuasion through the practice of picketing," citing the observations of Judge McPherson in *Atchison T. & S. F. Ry. Co. v. Gee*, 139 F. 582, 584, that:

> "There is and can be no such thing as peaceful picketing any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching."

The court in the Gee case, supra, after stating as above quoted, continued:

> "When men want to converse or persuade, they do not organize a picket line. When they only want to see who are at work, they go and see, and then leave, and disturb no one physically or mentally. But such picketing as is displayed in the case at bar by the evidence does, and is intended to, annoy and intimidate. The argument seems to be that anything short of physical violence is lawful. One man can be intimidated only when knocked down. *But the peaceful, law-abiding man can be and is intimidated by gesticulations, by menaces,* by being called harsh names, and by being followed, or compelled to pass, by men known to be unfriendly. Perhaps such a man may not be a bully, but is frail in size and strength, or he may be a timid man; but such a man is just as much entitled to go and come in quiet, without even mental disturbance, as has the man afraid of no one, and able with or without weapons to cope with all comers. *The frail man, or the man who shuns disturbances, or the timid man, must be protected, and the company has the right to employ such.*"

In view of the foregoing authorities, it is respectfully submitted that inasmuch as, by the accepted construction of the term, petitioner has been guilty of an "unlawful intimidation", he cannot now be heard to complain that a statute, which he insists prohibits "peaceful picketing", is unconstitu-

tional, for the reason that, as stated in the *Henneford v. Silas Mason Co. case*, 300 U. S. 577, 583, supra, he is the champion of no rights but his own and those rights admittedly are not impaired by Section 3448, if he was not "peacefully picketing".

C.

SECTION 3448 OF THE CODE OF ALABAMA, 1923, IS A VALID EXERCISE OF THE POLICE POWER OF THE LEGISLATURE OF THE STATE OF ALABAMA.

This Court has repeatedly held that the Fourteenth Amendment to the Constitution of the United States does not destroy the power of the states to enact police legislation as to subjects within their control.

Davis v. Massachusetts, 167 U. S. 43, 47;

Barbier v. Connolly, 113 U. S. 273;

Minneapolis and St. Louis Ry. Co. v. Beckwith, 129 U. S. 26, 29;

Giozza v. Tiernan, 148 U. S. 657;

Jones v. Brim, 165 U. S. 180, 182.

Without doubt the property of the community is a proper subject for police regulation and protection, Munn v. Ill, 94 U. S. 113, 124, Patterson v. Kentucky, 97 U. S. 501, 504, and certainly it cannot

be disputed that a person's business is property and if lawfully conducted is entitled to protection from any unlawful interference.

Truax v. Corrigan, 257 U. S. 312, 327;

Gompers v. Buck Stove and Range Co., 221 U. S. 418;

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229;

International News Service v. Associated Press, 248 U. S. 215;

Duplex Co. v. Deering, 254 U. S. 443, 465.

United Union Brewing Co. v. Beck, 93 P. (2d) 772, 781 (Supreme Court of Washington, Sept. 13, 1939);

Safeway Stores v. Retail Clerks Union, 184 Wash. 322, 51 P. (2d) 372;

Meadowmoor Dairies v. Milk Wagon Drivers Assn., 371 Ill. 377, 21 N. E. (2d) 308.

It is conceded that there is a limit to the valid exercise of the police power by the states. There is no dispute concerning this general proposition. It is submitted, however, that in every case that comes before this Court where the protection of the federal constitution is sought to overthrow legislation of this character, the question necessarily arises for decision:

"Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty?"

Lochner v. N. Y. 198 U. S. 45, 56;

Graves v. Minnesota, 272 U. S. 425, 428;

Gitlow v. N. Y., 268 U. S. 652, 666, 667, 668, 669.

In determining this question, it is settled that this court should not and will not search for reasons to hold the act invalid. On the contrary, the burden is on petitioner to establish the fact that the statute is unreasonable, arbitrary or unnecessary. Mugler v. Kansas, 123 U. S. 623, 661.

In *Graves v. Minnesota*, supra, the court, after stating that every presumption is to be indulged in favor of the validity of a statute, (citing *Mugler v. Kansas*, 123 U. S. 623, 661), continues:

"And the case is to be considered in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare and its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest. Great No. Ry. Co. v. Clara City, 246 U. S. 434, 439; Gitlow v. N. Y. 268 U. S. 652, 668."

In *Chicago, B. & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 567, this court in referring to the guarantee of liberty under the Fourteenth Amendment, stated:

> "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. * * * The principle involved * * is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. *The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.*
>
> "The principle was thus stated in *McLean v. Arkansas*, 211 U. S. 547, 548: 'The legisla-

ture, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. (Cases cited.) * * * If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law; it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.'" (Emphasis supplied)

1.

Section 3448 Prohibits Only Picketing Carried On For The Purpose Of Injuring Another And Does Not Limit Other Picketing Activities.

This brings us, therefore, to a consideration of whether or not Section 3448 of the Code of Alabama, 1923, is a valid police regulation or whether it is so arbitrary and unreasonable as to interfere with those liberties guaranteed by the Fourteenth Amendment.

Labor disputes are as old as organized society. It is not the province of this brief to indulge in

polemics as to the merits of these age-old controversies, nor will we attempt to speculate upon whether or not an act of the legislature is the wisest or the best remedy for dealing with such problems. That is a matter committed by the Constitution of Alabama to the legislative branch of government.

Suffice it to say that the Legislature of Alabama, after considering the public needs enacted Section 3448 into law.

Particular attention is directed to the language of Section 3448:

> "Section 3448. Loitering or picketing forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, *for the purpose* of *hindering, delaying* or *interfering with* or *injuring any lawful business or enterprise of another*, shall be guilty of a misdemeanor; but nothing therein shall prevent any person from soliciting trade or business for a competitive business."

It is immediately apparent that it is not all loitering and not all picketing that is prohibited by the statute. Loitering and picketing for the purpose of advancing one's own well-being are obviously permitted. That which is prohibited is loitering without a just cause or legal excuse therefor, and picketing "for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another." Indeed, petitioner was charged in the solicitor's complaint filed in the Circuit Court of Tuscaloosa County (R. 5, 6), in count 3, with having picketed the works of the Brown Wood Preserving Company, Inc. "for the purpose of hindering, delaying or interfering with or injuring the lawful business or enterprise" of that company, and was convicted as charged in the complaint (R. 8).

The Legislature has definitely qualified the picketing which it prohibited. In so doing, the statute crystallizes into canon law not only the best considered opinions of the best courts but the common law rule as well. (See Brandeis dissent in Truax v. Corrigan, infra). The Legislature recognized the conclusion which was reached by Messrs. Frankfurter (now Mr. Justice Frankfurter of this court) and Green in their work entitled "The Labor Injunction" (p. 25) that:

> "The damage inflicted by combative measures of a Union—the strike, the boycott, the picket—must win immunity by its purpose."

This conclusion is based upon the fundamental principle that no right is so absolute that it may be

exercised under any circumstances and without any qualification but, in all instances, such rights must be exercised with reasonable regard for the conflicting rights of others. As stated in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 254:

> "The familiar maxim, Sic utere tuo ut alienum non laedas—literally translated, 'So use your own property as not to injure that of another person,' but by more proper interpretation, 'so as not to injure the rights of another,' (Broom's Leg. Max., 8th ed., 289)—applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one in using it is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it. And a most familiar application is the action for enticing an employee, in which it never was a justification that defendant wishes to retain for himself the services of the employee. 1 Black. Com. 429; 3 Id. 142."

And as said by Mr. Chief Justice Waite, speaking for this Court in the case of *Munn v. People of Illinois*, 94 U. S. 113, at 123, 124,

> "The Constitution contains no definition of the word 'deprive,' as used in the 14th Amendment. To determine its signification therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

"While this provision of the Amendment is new in the Constitution of the United States as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the 5th Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the National Government, and by the 14th, as a guaranty against any encroachment upon an acknowledged right of citizenship by the Legislatures of the States.

"When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament and, through their State Constitutions or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the

powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good.' *This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe v. R. R. Co., 27 Vt., 143, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim Sic tuo ut alienum non laedas. From this source come the police powers, which, as was said by Chief Justice Taney in the License Cases, 5 How., 583, 'Are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.' Under these*

powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. * * *" (Emphasis supplied)

In an effort to ascertain whether Section 3448 is a fair, reasonable and appropriate police regulation of the relative rights of capital and labor we have made every effort to read most of the vast amount of conflicting judicial decisions treating labor disputes. The greatest portion of these decisions are found in the multitudinous injunction proceedings which have been filed throughout the United States since the middle of the Nineteenth Century. Numerous decisions are found holding that "picketing" is per se unlawful and, indeed, this seems to be the conclusion uniformly reached by the federal courts. Other decisions permit picketing if "peaceful." Still others find a middle ground, etc. See "The Labor Injunction" by Frankfurter and Green, "The Fiction of Peaceful Picketing", by Frank E. Cooper, Michigan Law Review, Vol. 35, November, 1935, No. 1.

Also 48 Yale L. J. 308;

33 Columbia L. R. 1188;

38 Columbia L. R. 1519;

15 Texas Law Review No. 3, page 314;

L. R. A. 1981C, 277, 282;

6 A. L. R. 894, 909, 928 et seq;

27 A. L. R. 642, 651, 654, et seq;

35 A. L. R. 1194, 1200;

83 A. L .R. 193, 201;

92 A. L. R. 1450, 1471;

97 A. L. R. 1318, 1333, 1350;

122 A. L. R. 1043.

Above this apparent maelstrom of legal and economic theories advanced by those who have considered the question here presented there has always stood out one fundamental principle—agreed on by all courts and all economic theorists—that the right of one group to organize for the advancement of its own ends is exactly equal to but not greater than the right of other citizens peaceably to pursue their own lawful occupations. Wherever there is conflict between such rights it is held that recourse must be had to the fundamental tenet "sic utere tuo ut alienum non laedes."

The Fourteenth Amendment, it is true, guarantees freedom of speech and freedom of the right of assembly. Yes—but not freedom to say whatever one pleases regardless of the injury to others—not the freedom to speak a libel of another tending to provoke a breach of the peace—not freedom to defame the character of a woman imputing to her a want of chastity—not freedom to accuse another

falsely of committing a felony or other indictable offense involving moral turpitude—but the freedom to advance, by word of mouth, one's own cause,—to criticize, yes—to communicate information and opinion, yes—but not to deliberately and maliciously injure another.

Every person, it is asserted has the right to be free from arbitrary personal restraint or servitude but one who is prevented from injuring another cannot justly assert that he has himself been deprived of any right, for when one becomes a member of society he necessarily parts with some privilege which, as an individual not affected by his relations to others, he might merit.

Munn v. Illinois, 94 U. S. 113, 123, supra.

We have made an intensive search of the state decisions and find that they have, without exception, echoed and re-echoed this sentiment that the damage inflicted by a picket must win immunity by its purpose. For the convenience of the court we herewith list the leading cases from the several states in the Union which have dealt with the subject, with appropriate quotations therefrom, all indicative of the propriety and reasonableness of the regulation adopted by the Legislature of Alabama, to wit, Section 3448 of the Code of Alabama, 1923, which limits picketing only where the purpose theerof is to injure another.

The Supreme Court of Arkansas has treated the question in the leading case of *Local Union No.* 313.

Hotel and Restaurant Employees International Alliance v. Stathakis, 135 Ark. 86, 205 S. W. 450, 452, as follows:

> "The labor union or its representatives and employes had the right to exhibit the placards in question to the public; but it is a far different thing to say that the right to exhibit these placards to the public carried with it the right to so patrol or picket appellee's places of business with these placards as to interfere with his lawful business. The cases all agree that the right to carry on a lawful business without obstruction is a property right, and one which the courts have never hesitated to protect, and its protection is a proper object for the granting of an injunction.
>
> "The placard itself may be lawful and its display, therefore, not unlawful; yet, with the use of such a placard, or, for that matter, without the use of any placard, one's right to prosecute his own lawful business may be unnecessarily interfered with. *The legality of the inscription on the placard* and *the right to display such a placard did not give one the right to make any use he pleases of the placard.* It is commonly said that one may do as he pleases with his own; but that is not an exact statement of the law. *He cannot so use his own as to inflict unnecessary injury upon another.* This truth is so just and so apparent that early in the history of our law the maxim grew up, 'Sic utere tuo ut alienum non laedas.' This maxim

was quoted and translated by Mr. Justice Pitney in the case of Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260, where it was said:

"'The familiar maxim, "Sic utere tuo ut alienum non laedas" literally translated, "So use your own property as not to injure that of another person," but by more proper interpretation, "so as not to injure the rights of another" (Broom's Legal Maxims 8th Ed. 289) applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one in using it is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it.'

"This quotation was used in the case cited in a discussion of the relative rights of the employer and the employe wherein the right of the employer was unheld to discharge the employe for joining a labor union. In that case, as in an infinite number of others, it was recognized that rights are reciprocal, and so are duties. But the occasion may arise when rights are conflicting. I have the right to use the sidewalk and any portion thereof and at all hours, subject to necessary police regulations. But so has my neighbor. My right qualifies his, and his right qualifies mine, so that each must exercise his right in a manner not to interfere unnecessarily with the rights of the other. So here the strikers and the union to which they

belonged and the employes thereof had the right to give notice to the public that appellee's cafes were open shops, and therefore unfair to union labor; but, in doing this, they had no right to exercise coercion resulting from the conduct herein set forth. *They were not using the streets* in front of appellee's place of business *for the ordinary purposes for which streets and sidewalks are intended, but were using them for the avowed purpose of injuring his business or driving away the patronage which the public might otherwise have given him.* Their interference with his business was direct and immediate, and was intended so to be." (Emphasis supplied)

The Supreme Court of California has reached a similar conclusion holding that "peaceful picketing" is lawful if its purpose is the "lawful effort of the picketers to promote their own welfare".

J. F. Parkinson Co. v. Building Trade Council, 154 Cal. 581, 603, 604, 98 P. 1027, 1036.

And in *McKay v. Retail Automobile Salesmen Local No.* 1067, 89 P. (2) 426, 433, the California Court says:

"Peaceful picketing is not lawful if it is expressly prohibited by law or is conducted for an unlawful purpose."

The Court of Chancery of Delaware in *Sarros v. Nouris*, 15 Del. Ch. 391, 138 A. 607, has concluded that:

"If the strike was solely to injure the complainants in their business, it was according to all the authorities illegal, and any picketing or other activities designed to promote it should be enjoined. *** They must have had some purpose which in their opinion justified them as a matter of self advancement in inaugurating against the complainants a strike campaign which must necessarily result in their serious pecuniary loss. Unless such a motive is found, the defendants are in the unenviable position of wantonly inflicting injury upon another to his great damage without corresponding benefit to themselves."

The Florida Supreme Court in *Paramount Enterprises, Inc. v. Mitchell*, 104 Fla. 407, 140 So. 328, 332, has enunciated a similar rule, holding that:

"No man or set of men with real personal interests to serve and not legitimate interests to protect, may, by malicious means destroy the business of another."

The Supreme Court of Georgia in *McMichael v. Atlanta Envelope Co.*, 151 Ga. 776, 108 S. E. 226, 229, adopts the rule established by the Supreme Court of Illinois in *Barnes v. Typographical Union*, 232 Ill. 431, 436, 83 N. E. 945, concluding that:

"It must be conceded that *argument and persuasion are lawful if not directed to the accomplishment of an illegal and unlawful purpose* * * *. An act which is naturally innocent,

when done with actual malice for the purpose of injuring another and followed by such injury, is not excused because the act might be innocent under other conditions." (Emphasis supplied)

In a more recent case the Supreme Court of Illinois has reiterated the doctrine stating:

"*The law is that, if the primary purpose is a malevolent one to injure the employer or his business, the object is unlawful,* whether it is accomplished by mere persuasion or by physical violence (A. R. Barnes & Co. v. Chicago Typographical Union, supra), but, where the primary object of the combination is to further the interests of the organization and improve and better the conditions of its members, whatever injury may follow to others is merely incidental. * * *.

"* * * *we have given sanction to the doctrine that, when the object of a strike is unlawful any act in furtherance thereof is also unlawful,* and that, when the acts of strikers, although unaccompanied by violence or threats, are such an annoyance to others as to amount to coercion or intimidation, they are unlawful. *To that effect is Hitchman Coal & Coke Co. v. Mitchell,* 245 U. S. 229, 38 S. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918 B, 461." (Emphasis supplied)

Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, cert. den. 295 U. S. 734.

In a case decided May 16, 1939, the Supreme Court of Indiana reiterated the rule which was previously adopted in *Karges Furniture Co. v. Amalgamated Wood Workers Local Union No.* 431, 165 Ind. 421, 428, 75 N. E. 877, 879, that, whereas, peaceful picketing for the purpose of informing the public of the nature of the Union's difficulty was legal, the activities of a picketer singly or with others, "not to better himself but to injure his rival" is an "actionable wrong."

Weist v. Dirks, 20 N. E. (2d) 969, 972.

In a leading Iowa case, *Ellis v. Journeyman Barbers' International Union of America, etc.*, 194 Iowa 179, 191 N. W. 111, 113, the Supreme Court of Iowa observes:

> "Conduct directly affecting his employer to his detriment by interference with his business, is not justifiable in law, unless it is of a kind and for a purpose that has a direct relation to benefits that the laborers are trying to obtain."

The Court of Appeals of Kentucky, citing numerous cases in support of its conclusion, adopts the following rationale:

> "Labor has the recognized legal right to acquaint the public with the facts which it regards as unfair, to give notoriety to its cause and to use persuasive inducements to bring *its own policies* to triumph. Such picketing or pub-

licity is not per se unlawful." (Emphasis supplied)

And the court concludes that if the purpose is not to advance "its own policies", the picketing must be held unlawful.

> Music Hall Theater v. Moving Picture Machine Operators Local, 249 Ky. 639, 61 S. W. (2d.) 283, 285.

In *Hughes v. Kansas City Motion Picture Machine Operators Local No.* 170, 282 Mo. 304, 221 S. W. 95, certiorari denied 254 U. S. 632, error dismissed, 257 U. S. 621, the Supreme Court of Missouri states:

> "The privilege of free movement on the streets and of free speech belonged to defendants, but not to the extent that they may be exercised (*for no legitimate purpose of defendants*) in a place and manner and *with the intention to annoy and damage plaintiffs.*" (Emphasis supplied)

In Massachusetts, the rationale for decision shifts almost completely to an emphasis upon the issue of justifiable ends. The analysis for application is the one articulated in the classic dissent by Mr. Justice Holmes in *Vegelahn v. Guntner*, 167 Mass. 92, 104; and adopted by the majority in *Plant v. Woods*, 176 Mass. 492. Self-interest in its undefined amplitude is the end that justifies. Thus, the Massachusetts Supreme Court recognizes as legal a

strike for higher wages, shorter hours and improved shop conditions.

Cornellier v. Haverhill Shoe Manufacturers Association, 221 Mass. 554.

But a strike instituted to compel a Union shop to close is, according to the Massachusetts court of no "importance to these employees in reference to their benefit or comfort or other direct interest as employees."

Martineau v. Foley, 225 Mass. 107;

W. A. Snow Iron Works, Inc. v. Chaywick, 227 Mass. 302.

Also see Harvey v. Chapman, 226 Mass. 191, 115 N. E. 304.

The Supreme Court of New Hampshire has also had occasion to consider the question and in the case of *White Mt. Freezer Co. v. Murphy*, 78 N. H. 398, 107 A. 357, the court stated:

"The defendants are called upon to justify their action (picketing activities around the plaintiff's plant) * * *. Interference with the right of another without justification is unreasonable, whether the motive of the strikers was an honest effort to benefit themselves or a malicious intent to injury the plaintiffs' company. That they refused to aid in compelling other workers to join the defendant's Union is a question of fact upon which the case contains no evidence."

The New Hampshire court observed that:

> "The authorities are practically unanimous to the effect that the defendant is liable unless he shows a justification."

In *Grimes v. Durnin*, 80 N. H. 145, 114 A. 273, the court, in considering the actions of persons picketing a restaurant operated by the plaintiff, observed:

> "The picketers called out in a loud voice 'strike on at Grimes Lunch; unfair to organized labor; this restaurant on strike.' * * * Their (the picketers) real intention was to 'win the strike regardless of the effect upon the plaintiff's business, 'and, if injunction had not been served, they would have continued the strike until the plaintiff signed the agreement; * * * Upon these facts there can be no doubt that the court was authorized and justified in issuing an injunction. * * *"

The Court of Chancery of New Jersey in *International Ticket Co. v. Wendrich*, 122 N. J. Eq. 222, 193 A. 808, also adopts the general formula, concluding:

> "The object of the strike being unlawful, all acts in support thereof, including picketing, are also unlawful. Bayonne Textile Corporation v. American Federation of Silk Workers, supra, 116 N. J. Eq. 146, at page 161, 172 A. 551, 92 A. L. R. 1450; Elkind & Sons, Inc., v. Retail Clerks International Protective Associa-

tion, supra; Dorchy v. State of Kansas, 272 U. S. 306, 311, 47 S. Ct. 86, 87, 71 L. Ed. 248, 269; Toledo, Ann Arbor & North Michigan Railroad Company v. Pennsylvania Company (C. C.) 54 F. 730, 737, 19 L. R. A. 387. In Senn v. Tile Layers Protective Union, 57 S. Ct. 857, 867, 81 L. Ed..... Mr. Justice Butler said: 'But strikes or peaceful picketing for unlawful purposes are beyond any lawful sanction. The object being unlawful, the means and end are alike condemned."

The New York Supreme Court has likewise adopted a similar view. In *National Protective Association v. Cummins*, 170 N. Y. 315, both majority and dissenters looked to the motives or purposes of the strikers and picketers in considering whether an injunction properly should issue. As the majority read it, there was "no pretense that the defendant associations * * * had any other motive than one which the law justifies of attempting to benefit their members by securing their employment." See 170 N. Y. 327. The dissenting judges observed that "the object of the defendants was not to get * * * better terms for themselves, but to prevent others from following their lawful calling."

The Supreme Court of Rhode Island likewise condemns picketing where the "primary and plain object of the picketers was to injure complainant's business" rather than to advance their own interests.

Bomes v. Prov. Local Union No. 223, 51 R. I. 449, 155 A. 581.

The Supreme Court of Tennessee in an elaborate consideration of the matter in *Lyle v. Local No. 452, Amalgamated Meat Cutters* etc., 174 Tenn. 222, 124 S. W. (2d.) 701, 703, joins the many other authorities in concluding that where the end is unlawful there can be no legal picketing.

In *Sheehan v. Levy*, 238 S. W. 900, the Commission of Appeals of Texas collates numerous Texas decisions holding that interference by picketers wantonly and maliciously, rather than to serve some legitimate purpose of their own, is unlawful. The court states:

> "A man may lawfully refuse to have business relations with another for any reason—on account of whim, caprice, prejudice or ill will. He may lawfully induce others to refrain from having business relations with such third person, though it injuriously affects such person, *provided his action be to serve some legitimate interest of his own.* * * * Our Supreme Court says that, if the Sheehan workers were withdrawn for no other purpose than to injure his business, the withdrawal was wrongful and therefore actionable." (Emphasis supplied)

The Supreme Court of Washington has taken a similar attitude toward picketing, the object of which is not the advancement of the picketer's cause but the intention to injure the person or persons picketed.

Danz v. American Federation of Musicians, Local 76, 133 Wash. 186, 233 P. 630;

Safeway Store, Inc. v. Retail Clerks Union Local 148, 184 Wash. 322, 52 P. (2d.) 372;

Farnili v. Auto Machinists Union Local 297, 93 P. (2d.) 422.

Other decisions indicative of a similar attitude on the part of other state courts are *State v. Howart*, 109 Kan. 376, 198 P. 696, error dismissed 258 U. S. 181; *Medford v. Levy*, 31 S. C. 699, 8 S. E. 302; *In re: Langell*, 178 Mich. 305, 144 N. W. 841, (Here the court observes that 'the later and more reasonable rule, however, holds that all picketing is illegal. It is interesting to note that the decision was rendered on January 5, 1914.); *International Pocketbook Workers Union v. Orlove*, 158 Md. 496, 148 A. 826.

Additional judicial precedent is to be found in the decisions of this Court. In *Duplex Co. v. Deering*, 254 U. S. 443, 473, 474, the court concluded that the institution of a strike against an employer who is at peace with his own employees solely to compel such employer to withdraw his patronage from the plaintiff with whom there was a dispute "cannot be deemed 'peaceful and lawful' persuasion."

In the recent case of *Senn v. Tile Layers Protective Union*, 301 U. S. 468, this court itself recognized the rule as settled:

"But strikes or peaceful picketing for unlawful purposes are beyond any lawful sanction. The object being unlawful, the means and end are alike condemned."

Attention is here also directed to the fact that Alabama is a common-law State and was such at the time of the enactment of Section 3448 and its predecessor. Section 14 of the Code of Alabama of 1923 (Code of Alabama of 1907, Section 12) provides as follows:

"Section 14. Common law of England, adopted.—The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this State, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the legislature."

At common law a conspiracy to injure the public, or the practice of acts and teachings of doctrines with the intention or purpose to injure the public or any member thereof was undoubtedly a crime. See dissenting opinion of Brandeis, J., in Truax v. Corrigan, 257 U. S. 312, 354 et seq.

It thus appears that when the Legislature of Alabama found themselves called upon to enact legislation to protect the public welfare against the well-known evils which arise from unregulated picketing of certain types, that body, while recognizing the essential principles that our economic system is founded upon the doctrine of free competition, that

large aggregations of capital are not inconsistent with the doctrine of free competition but are indeed inevitable and socially desirable, and that the individual members must combine in order thereby to achieve the possibility of free competition with concentrated capital, necessarily concluded, in the light of all the foregoing judicial precedents and the rule at common law which was already part and parcel of the State system of law, that this combination of workers and their activities should be for their *own* advancement and not for the destruction of capital.

Can it be seriously contended then that the legislation which assures such a balance of rights is without justification?

The appellate courts of California, Texas and Indiana long ago answered this question by expressing their approval of ordinances and statutes seeking to maintain such a balance.

In the *Matter of Williams*, 158 Cal. 550, the court stated:

> "* * * the prisoner was charged in the information with two distinct offenses, as defined by the ordinance: 1. With 'loitering' on a public street in front of the Fulton Engine Works for the purpose of inducing and influencing persons to refrain from doing and performing services and labor at said works; 2. With 'picketing' in front of said works for the purpose of intimidating, threatening, and coercing such persons. It is argued in support of the petition that the

ordinance is invalid. As to the provision concerning 'picketing' for the purpose of intimidation, threatening, etc., I have no doubt that it is a valid exercise of the powers of the local legislature."

In *Ex Parte Stout*, 82 Tex. Cr. 183, the Texas Appellate Court had this to say:

"The ordinance is not unreasonable, nor is it vague, uncertain, etc., so that it can not be understood. The ordinance seems clear, plain and easily understood. Instead of being unreasonable it is most reasonable, under the circumstances. Authorities above are quoted which show that the acts of relator which are denounced by said ordinance were clearly intended to intimidate and coerce all union labor folks and their sympathizers and others, from going into said restaurant or cafe and getting their meals or having any other business transaction with the owner or proprietor thereof. In other words, to injure and break up the proprietor in business. Such conduct as his would necessarily lead to disturbances, and had a tendency to intimidate and prevent all persons from entering said restaurant and would naturally injure the proprietor in his business. There can be no doubt but that the proprietor or owner of said restaurant had a right to conduct his business to suit himself and to employ union or non-union laborers as suited him and no one has the right to injure or disturb his business because he so chose to run it. The

fact that his restaurant abutted upon the portion of the sidewalk where the relator was undertaking to injure and disturb him and his business of itself would give him some rights. It was the duty of the City of El Paso by such an ordinance to protect him in the conduct of his business, otherwise the city would not have been doing its duty to him and other citizens 'to preserve and enforce good government, order and security of the city and its inhabitants, and to protect the lives, health and property of its inhabitants.'"

In *Thomas v. City of Indianapolis*, 195 Ind. 440, the Supreme Court of Indiana considered the question with the following result:

"Appellants assert that the ordinance in question is violative of many provisions of the state and federal Constitutions.

"In this connection, appellants make the following contentions: That it violates the Fourteenth Amendment to the Constitution, in that it abridges the privileges and immunities of appellants as citizens, * * *.

"Most of these contentions of appellants rest upon the same argument and which would seem to be founded upon the false premise that any regulation of society which is made for the general good is invalid if it prohibits a person from doing what he would otherwise have a right to do. At least most of their argument

would apply to practically all regulatory laws and ordinances which have been passed under the police power, to promote the public peace, safety and welfare.

"That the rights of the individual are subservient to the welfare of the general public is uniformly recognized by the courts. As was said by the Supreme Court of the United States, in *Jacobson v. Massachusetts* (1904), 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann Cas. 765; 'This court has more than once recognized it as a fundamental principle, that, "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the Legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned." ' * * * *

"This ordinance does not prevent employees from striking, nor does it prevent them from presenting their side of the controversy with their employer to others. It prohibits some acts that are inherently wrong and other acts which are not wrong within themselves, are regulated and only prohibited from being committed under such circumstances and in such places as may result in public disorder and cause breaches of the peace."

In a very recent case from the State of Wisconsin, *Wisconsin Employment Relations Board v. Allen Bradley, Local etc.* (unreported) the Circuit Court of Milwaukee County, in an elaborate opinion, after considering applicable state and federal decisions on the question, upheld the validity of a similar "balancing statute". In considering Section 111.06 (2) (a) (f) of the Wisconsin "Employment Peace Act", which the court states "is not intended to declare all mass picketing to be unlawful," but is expressly limited in its application to cases tending "to hinder or prevent * * * the pursuit of any lawful work or employment,' " the court therein states that:

> "The end sought to be accomplished is prevention and avoidance of unlawful means and the application of force and coercion."

It appears, therefore, that the Legislature of the State of Alabama has made a choice between well established precedents laid down on either side by some of the strongest courts in the country. We, therefore, cannot believe that this court will say that the State was acting arbitrarily or unreasonably when, in the exercise of its judgment, it determined from these decided cases, as well as the common law of the State, that the action of actively and directly interfering with, and preventing, the operation of the lawful business of another was an unlawful act, and enacted legislation prohibitory of such action. Cf. the observation of Justice Brandeis in his dissent in the case of *Truax v. Corrigan*, 257 U. S. 371, 372.

2.

Section 3448 Of The Code of Alabama, 1923, In Its Application To This Petitioner Has Not Deprived Him Of The Rights Of Freedom Of Speech And Assembly Guaranteed By The Fourteenth Amendment To The Constitution Of The United States.

It is earnestly submitted that there is no merit in petitioner's contention that his conviction was without due process of law, in that, his right of freedom of speech was violated.

We do not dispute that freedom of speech and the right of peaceful assembly are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. This, we believe, is firmly established by this court in the case of *De Jonge v. Oregon*, 299 U. S. 353, 364. We do not believe that the petitioner will seriously contend that the freedom of speech and the right of assembly which is secured by the Constitution, is an absolute right to speak or assemble, without responsibility, whatever and wherever one may choose, or an unrestricted and unbridled license which gives the immunity for every possible use of language or of right of assembly and prevents the punishment of those who abuse this freedom. This Court in *Gitlow v. New York*, 268 U. S. 652, 667, recognized the fallacy of any such contention stating:

"Reasonably limited, it was said by Storey (2 Storey on the Constitution, 5th Ed. Section 1580, p. 634) this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic."

What then is petitioner's position in this matter? In brief filed he asserts (petitioner's brief, p. 16) "the criminal misconduct for which the petitioner was convicted consisted of requesting his fellow worker not to return to work until a strike was settled." We do not believe that this is a fair statement of the matter. As hereinbefore shown, petitioner was charged with the offense of picketing "for a purpose condemned by the statute." The Court of Appeals held that the evidence was sufficient to show this petitioner guilty of the offense charged. Petitioner was not convicted for his words alone. The conviction must necessarily have rested upon the fact that he was a member of a picket line, gathered about the premises of the Brown Wood Preserving Company for the purpose, not of advancing their own interests, but of wilfully injuring the company, its property, and interests.

We are now confronted, therefore, with a picture wherein the freedom of speech right conflicts with the property right and in the same case; and it is asserted and argued that by reason of the opinions of this Court in the freedom of speech and freedom of the press cases, this Court is committed to a policy which in effect makes the freedom of speech right inviolate, or that the right of freedom of speech

is of such paramount importance that it may even destroy the property right and in cases where the two rights clash with each other. We respectfully submit that the freedom of speech right by reason of the absorptive process (See Gitlow v. New York, 268 U. S. 652) may have become a right of basic importance, but that this right should be subject to the same reasonable limitations and the same tests as have been put by this Court on the property right; and that when the Legislature of Alabama in effect treated both rights on an equal basis and said that where they clash each must give way to the other, that expression did not violate the due process clause of the Fourteenth Amendment. Cf. *Houston etc. Lines v. Local Union No. 886 etc.*, 24 F. Supp, 619, 633, where it is stated:

> "So the question * * * what is lawful and what is unlawful picketing and peaceful persuasion * * * rests, not with the courts but the legislative bodies."

The decision of this court in *De Jonge v. Oregon*, 299 U. S. 363, while undoubtedly sound, must be read in connection with the Oregon statute there under consideration which prohibited the holding of any meeting or the speaking of any word advocating or teaching the doctrine of criminal syndication etc. The court concluded that the broad reach of the statute would cover a speaker who assisted in the conduct of such a meeting; that however innocuous the object of the meeting, however lawful the subjects and tenor of the address, however reasonable and timely the discussion, all assisting in the conduct

of the meeting would be subject to imprisonment as felons if the meeting was held by the Communist Party. Section 3448 of the Alabama Code clearly permits of no such references. If a person speaks in support of his own rights and for the purpose of advancing his own cause, there is no offense under Section 3448. An assembly for the lawful purpose of peaceful action is not prohibited by Section 3448. If, on the other hand, a member of a picket speaks for the purpose of injuring another or if the picket assembles unlawfully and in a threatening manner, the speaking and the assembling become unlawful.

As was stated by this court in the case of *Robertson v. Baldwin*, 165 U. S. 275, 281:

> "* * * the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; * * *"

The following observations of Mr. Justice Lamar in the case of *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 439, also are here particularly applicable:

> "Society itself is an organization and does not object to organizations for social, religious, business and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence and power that come from such association. By virtue of this right, powerful labor unions have been organized.
>
> "But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made *it is the duty of government to protect the one against the many as well as the many against the one.*
>
> "In the case of an unlawful conspiracy, *the agreement to act in concert when the signal is published, gives the words 'Unfair,' 'We don't patronize,' or similar expressions, a force*

not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject-matter has power to grant an injunction." (Emphasis supplied)

Petitioner further asserts that an examination of the facts in the case of *O'Rouke v. City of Birmingham*, 27 Ala. App. 133, 168 So. 206, cer. den. 232 Ala. 355, 168 So. 209, will show that Section 3448 is being ruthlessly applied in Alabama to protect the economic interests of the employer against the Union rights of the employee. We deem it unnecessary to offer argument in contradiction of this contention, for this court has many times stated that *if the assailed provisions of a statute, as construed and applied in the case before it, afford due process, then it cannot be complained that in earlier cases they were so construed and applied as to deny due process to other litigants.*

Atlantic Coast Line v. Ford, 287 U. S. 502, 505;

Great Northern Ry. Co. v. Sunburst Oil and Refining Co., 278 U. S. 358;

Patterson v. Colorado, 205 U. S. 454, 460;

Brinkenhoff-Faris Co. v. Hill, 281 U. S. 673, 680;

Dunbar v. New York, 251 U. S. 516, 518; 519;

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 452;

Fleming v. Fleming, 264 U. S. 29, 31.

Thus, it will be seen that petitioner's insistence that in this particular case he was denied the liberties guaranteed him by the Fourteenth Amendment to the Constitution must be construed in the light of the facts which appear of record. Those facts have been set forth and commented upon at length in Part III of this brief. The courts have stated that the character of every act depends upon the circumstances in which it is done.

Schenck v. United States, 249 U. S. 47, 52;

Aikers v. Wisconsin, 195 U. S. 194, 205, 206.

Thus, it has been held that the most stringent protection of free speech would not protect a man from an injunction against uttering words which might have all the effect of force.

Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 439;

Jacobson v. Massachusetts, 197 U. S. 11.

It is submitted, therefore, that since it clearly appears from the record that the petitioner was a

member of a picket line located very close to the place of business of his former employer and since it further appears that petitioner was a member of a group of picketers consisting of a relatively large number, considering the location of the picket and the number of employees of the plant, it must be concluded that the picket was not a "peaceful picket" within the meaning of the authorities cited by counsel for petitioner, but rather that such picket was an offensive and unjustifiable annoyance calculated to bring about public disturbance and breaches of the peace and that the petitioner, being the champion of only his own rights, cannot now be heard to invoke the jurisdiction of this court to declare unconstitutional a statute which did not prohibit him from striking or presenting to others his side of the controversy, but only prevented him from acts inherently wrong.

Let us now consider what the result would be if petitioners' asserted right was sustained. The affect of their argument is that they ask this Court to hold as a substantive rule of law all picketing activities conducted as a means of enforcing a strike should be sustained under the freedom of speech guarantees of the due process clause. They say that the guarantee of "freedom of speech" gives them the right to maintain picket lines for the purpose of disseminating information, regardless of whether or not the means thus used are used to accomplish a lawful or unlawful end, and in spite of the public policy as declared by legislature or stated by the courts to be the common law of a State. They further say that the freedom of speech right is so inviolate

that it can and should destroy the property right when the two conflict, which conflict invariably appears in cases involving labor disputes. The petitioners are therefore asking for a declaration of a national policy by this Court. To all intents and purposes they ask this Court to declare that picketing is a lawful means to an end throughout the United States and in each and every State thereof under the guarantee of "freedom of speech" found in the due process clause of the Fourteenth Amendment, even though both the means employed and the end sought to be attained are unlawful by the law of the State. It is respectfully submitted that the court can reach no such conclusion.

D.

SECTION 3448 OF THE CODE OF ALABAMA, 1923, IS NOT VOID FOR INDEFINITENESS.

It is insisted that Section 3448 is void in that it fails to inform a defendant of the nature of the offense with which he will be charged and is, therefore, violative of the Fourteenth amendment to the Constitution. In the case of *Whitney v. California*, 274 U. S. 357, 368, this court reannounces the essential requirement of due process, that a penal statute must be "sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties," and be couched in terms that are not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." The

statute here involved particularly condemns the offense of picketing when carried on under certain circumstances. It would be absurd to argue that the term "picketing" is in and of itself so indefinite and vague as to prevent an understanding of its true import by men of common understanding. The cases which we have cited, supra, in this brief reiterate the conclusion that the act of picketing has a well defined meaning. The statute specifically states under what circumstances such picketing shall be unlawful, to wit, when it is conducted "for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another." In no sense of the word can it be contended that the act is not sufficiently explicit to inform those who are subject to it of the conduct which will render them liable to its penalties. This statute presents no greater uncertainty or indefiniteness in application to necessarily varying facts than has been repeatedly sanctioned by this court.

Nash v. United States, 229 U. S. 373, 377;

Miller v. Strahl, 239 U. S. 426, 434;

Burns v. United States, 274 U. S. 328.

E.

THE APPELLATE COURTS OF ALABAMA HAVE NEVER HELD ALL PICKETING REGARDLESS OF ITS PURPOSE, TO BE PROHIBITED BY THE ALABAMA PENAL STATUTES.

Counsel for petitioner in brief filed in this court insists that the courts of last resort of this State have specifically held that Section 3448 of the Code of Alabama, 1923, requires such a construction as will compel this court to declare it unconstitutional. The case of *Hardie-Tynes Mfg. Co. v. Cruise*, 189 Ala. 66, 66 So. 657, which is made the basis of petitioner's contention, it is true, contains an indication of the court's attitude toward the construction of the statute then before it. It is to be noted, however, that the section under consideration by the court in the Hardie-Tynes case was Section 6395 of the Code of Alabama of 1907, while the section now before this court for construction is Section 3448 of the Code of Alabama of 1923, which has been extensively amended as will appear from a comparison of the two sections which are set out, infra, for consideration of the court.

"Section 3448. Loitering or picketing forbidden. —Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, ing, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

"Section 6395. Unlawful to interfere with trading by others. — Any person or persons who go near to or loiter about the premises or place of business of any person, firm, or corporation engaged in a lawful business, for the purpose of influencing, or inducing others not to trade with, buy from, sell to, or have business dealings with such person, firm, or corporation, or to picket the works or place of business of such other person, firm or corporation for the purpose of interfering with or injuring any lawful business or enterprise, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

It is to be noted also that, although the court holds that the effect of Section 6395, when considered with the other code sections cited, is that there can be no such thing as "peaceful picketing or peaceful persuasion," the court did not have for consideration at that time a case of "peaceful picketing or peaceful persuasion." The reported decision clearly reflects that threats, intimidation and violence were

made the basis of the proceeding. The statement of the court is clearly dicta and there is no indication that it will be again adopted without limitations. Since the Hardie-Tynes decision, the Supreme Court of Alabama has never expressed itself other than by the mere denying of certiorari in this case and in the O'Rouke case which has been treated, supra.

F.

CASES CITED BY PETITIONER

The cases cited by petitioner, *C. I. O. v. Hague*, 307 U. S. 496; *Senn v. Tile Layers Union*, 301 U. S. 468; *De Jonge v. Oregon*, 299 U. S. 363, and *People v. Harris*, 91 P. (2d) 993, are readily distinguishable. The case of C. I. O. v. Hague did not deal with a question of picketing. We do not dispute the statement contained therein, which is quoted by petitioner at page 13 of his brief, but if the case is cited as authority for petitioner's contention that Section 3348 is unconstitutional, we feel that the court will at once recognize the inapplicability of the citation.

Involved in the Hague case was a regulatory ordinance which forbade the doing of certain things except by permission of certain municipal officers. The statute here is not regulatory. It is a criminal prohibitory ordinance. It does not call for the issuance of permits by anyone.

Nor do we deny the soundness of the quotation from Senn v. Tile Layers Union. While it is to be

noted that Mr. Justice Butler states that the right to strike or picket peacefully "to better their condition," does not infringe any right of the employer, nowhere in the opinion is it intimated that if the purpose is not to "better the condition" of the workers but to injure the employer, the strike or the picket are justifiable. Indeed, as we have quoted, supra, a specific condemnation of any such action is set forth in Mr. Justice Butler's opinion.

The De Jonge case involved a statute specifically directed against speaking and the facts presented to this court clearly reveal the inapplicability of the citation. We have discussed this case elsewhere in the brief and we do not feel that it merits further discussion here.

Nor can petitioner find consolation in the recently decided cases involving the question of certain regulations, embodied in the municipal ordinances considered, abolishing the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment to the Constitution.

Schneider v. State of New Jersey;

Young v. State of California,

Snyder v. City of Milwaukee;

Nichols & Thompson v. Commonwealth of Massachusettts.

Nos. 11, 13, 18 and 19—October Term, 1939.

(MS), decided November 22, 1939.

These cases merely confirm the undoubted right of every citizen to freely communicate *information and opinion* and condemn ordinances limiting or licensing this freedom of communication. We do not here argue that Section 3448 would be constitutional, if it prohibited such free communication. We merely insist that the purpose of the communication of such *information and opinion* cannot be the injury of another, and that Section 3448 is directed to securing this end and this end only.

The distinction between the several cases heretofore decided by this Court treating the guarantee of the right of freedom of speech to the parties involved and the present case is found in the case of *Lovell v. City of Griffin*, 303 U. S. at page 451, wherein this court, after stating that the ordinance of the City of Griffin is comprehensive in that its character is such that it struck at the very foundation of the freedom of the press by subjecting it to license and censorship, the court concludes:

> "It (the ordinance) is not limited to ways which might be regarded as inconsistent with the maintenance of such order * * *."

In the instant case the Legislature of Alabama has determined that where picketing is carried on for purposes such as that condemned by the statute, the obvious effect would be to create disturbances of the peace and general public disorder, and in an effort to prevent these disturbances in the protection

of the public welfare, the Legislature in its wisdom has prohibited picketing under such circumstances. Cf. *Buxbom v. City of Riverside*, 29 F. Supp. 3 (D. C. S. D. Calif.)

We believe the case of People v. Harris to be here inapplicable for two reasons. First, the court in that case was considering picketing which was "carried on without intimidation or coercion" and picketing wherein the methods employed "did not involve fraud, violence, breach of the peace or threat thereof nor did such persons commit any act or acts tending thereto," while here, as we have shown, the atmosphere was one of intimidation and threat of violence. Second, the decision is, as described by Justice Bakke of the Colorado court, one of "a mountain laboring and bringing forth a mouse" and at that, a mouse which is "too grey and not recognizable in the dark." The State of Colorado, it will be noted, had adopted a statute providing against the issuance of injunctions prohibiting acts similar to those declared illegal by the statute. Justice Bakke states that this latter act impliedly repealed the criminal statute "to the extent that peaceful picketing in a labor dispute is no longer a crime." This treatment of the matter he bases on a similar conclusion reach by the Supreme Court of Wisconsin in *American Furniture Co. v. Chauffeur's Local*, 222 Wis. 338, 358, 258 N. W. 250, 258. Attention is also called to the case of *Local Union No. 26 etc. v. City of Kokomo*, 211 Ind. 72, 5 N. E. (2d) 624, in which the Supreme Court of Indiana reached a similar conclusion. It thus appears that the decision of the Colorado Supreme Court was, in a measure, col-

ored by the expressed legislative policy of that State, and, therefore, should not be here considered as persuasive authority.

Many other cases are cited by petitioner in his brief at pages 9, 10, and 11. We have examined each of these cases and find that in none of them is it stated that a State in the exercise of its police power may not regulate picketing activities or prohibit them when they are carried on, not for a lawful purpose but in such manner as to clearly constitute an unlawful and unjustifiable interference with the property rights of another, and thus calculated to bring about public disturbances injurious to the great body of the people.

The case of *City of Reno etc. v. State of Nevada etc.* set forth in the appendix to counsel's brief, also recognizes the fundamental rule that peaceful picketing is characterized by "peaceful persuasion for the promotion of a *lawful purpose.*" See petitioner's brief, pages 33, 36 and 37. The Alabama statute has stated that where picketing is carried on for the purpose of "hindering, delaying or interfering with or injuring any lawful business or enterprise of another" it shall be unlawful. The *purpose* being unlawful, it cannot be contended that the picketing here involved was lawful. In the Nevada case the court concluded that Sections 2 and 4 of the statute set out at pages 29 and 30 of petitioner's brief were unconstitutional. The court concluded that these sections "do not seek to merely regulate picketing * * * forbidding picketing under circumstances claimed to be unlawful, tortious or inequitable, or

containing other regulations designed to reasonably control picketing. They go beyond regulation. They are a sweeping prohibition of any form of picketing irrespective of its nature, *purpose* or number of pickets * * *."

It is, therefore, respectfully submitted that the cases cited by petitioner, far from being conclusive on the point, have been shown to be in full accord with the principles which we have maintained should control the decision in this cause.

CONCLUSION.

We conclude then that it having been shown that petitioner was not "peacefully picketing," but was picketing in a manner calculated to threaten and intimidate prospective employees of the Brown Wood Preserving Company, and it having further been shown that the courts hearing the evidence found that the petitioner was picketing for the purpose of hindering, delaying or interfering with or injuring the lawful business of the Brown Wood Preserving Company, petitioner cannot now be heard to complain that he was deprived of any rights guaranteed him by the Fourteenth Amendment to the Constitution of the United States. We further conclude that, even assuming that the conduct of petitioner had been such as to permit him to here raise the constitutionality of Section 3448 of the Code of Alabama, 1923, such section must be here held constitutional since it is a reasonable and justifiable police regulation of the sovereign State of Alabama.

It is, therefore, respectfully insisted that this case should be affirmed.

Respectfully submitted,

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